

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA**

THE CITY OF HUNTINGTON,

Plaintiff,
v.
AMERISOURCEBERGEN DRUG
CORPORATION, *et al.*,

Defendants.

Civil Action No. 3:17-01362
Hon. David A. Faber

CABELL COUNTY COMMISSION,

Plaintiff,
v.
AMERISOURCEBERGEN DRUG
CORPORATION, *et al.*,
Defendants.

Civil Action No. 3:17-01665
Hon. David A. Faber

**DEFENDANTS' SUPPLEMENTAL MEMORANDUM
IN SUPPORT OF MOTION FOR A TRIAL
CONTINUANCE DUE TO THE COVID-19 PANDEMIC**

This afternoon, shortly after Defendants filed their motion for a continuance due to Covid-19 (Dkt. 1071), Judge Polster postponed indefinitely the Track One-B opioid trial that was set to begin November 9, “[d]ue to the ongoing COVID-19 pandemic and the General Orders of the Court.”¹ He instead will proceed with the previously scheduled May 2021 Track 3 trial against

¹ See *In Re: National Prescription Opiate Litigation*, Case No. 1:17-md-2804 (N.D. Ohio Oct. 5, 2020) (minute order). The Northern District of Ohio has entered a general order, to which Judge Polster referred, precluding jury trials of longer than a week without the parties’ consent, and the Track One-B defendants did not consent to a lengthy trial during the pandemic.

the same national-pharmacy defendants who were involved in the now-postponed November trial. No other federal opioid trial is yet scheduled. Notably, the trial that Judge Polster postponed was to be held in Cuyahoga County, Ohio, where the average daily rate of new Covid cases is approximately one-fourth that in Kanawha County and has not risen above 6 per 100,000 residents (firmly in the yellow category) since September 8.²

Defendants also note that the federal Centers for Disease Control and Prevention today issued updated guidance regarding indoor airborne spread of Covid. According to the new guidance, “Some infections can be spread by exposure to virus in small droplets and particles that can linger in the air for minutes **to hours**. These viruses may be able to infect people who are **further than 6 feet away** from the person who is infected or **after that person has left the space.**”³ This new CDC statement underscores the danger of a trial whose participants would be required to spend many hours each day together in the same indoor space—in a high-risk county—for weeks on end.

Dated: October 5, 2020

See In Re: Coronavirus (Covid-19) Phased-In Recovery Plan, Order No. 2020-08-2 (N.D. Ohio Aug. 25, 2020).

² See Harvard Global Health Institute, Risk Levels Downloadable Data (Microsoft Excel spreadsheet), <https://globalepidemics.org/key-metrics-for-covid-suppression> (last accessed Oct. 5, 2020).

³ Centers for Disease Control & Prevention, *How COVID-19 Spreads*, last updated Oct. 5, 2020, <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/how-covid-spreads.html> (emphases added).

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned counsel hereby certifies that on this 5th day of October, 2020, the foregoing *Defendants' Supplemental Memorandum in Support of Motion for a Trial Continuance Due to the Covid-19 Pandemic and Request for Expedited Consideration* was served upon counsel of record electronically.

/s/ Steven R. Ruby

Steven R. Ruby (WVSB No. 10752)